R.R.R. Restaurant, Inc. d/b/a Capriccio Restaurant *and* Hotel Employees and Restaurant Employees Union, Local 100, of New York, New York and Vicinity, AFL–CIO. Case 2–CA–26658

September 23, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On June 6, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions, and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, R.R.R. Restaurant, Inc. d/b/a Capriccio Restaurant, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Any additional amounts due the welfare and pension funds mentioned in the judge's remedy and recommended Order shall be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The reimbursement of employees who suffered losses due to the Respondent's failure to make the fund payments shall be as prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and interest shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Kevin Smith and *James Paulsen, Esqs.*, for the General Counsel.
Leon Reich, Esq., for the Respondent.
Stephen O'Beirne, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on April 18, 1994, in New York, New York. The complaint herein, which issued on October 27 1993[1] and was based upon an unfair labor practice charge that was filed on July 1 by Hotel Employees and Restaurant Employees Union, Local 100, of New York, New York, and Vicinity, AFL–CIO (the Union), alleges that R.R.R. Restaurant, Inc. d/b/a Capriccio Restaurant (Respondent) violated Section 8(a)(1) and (5) of the Act by unilaterally modifying the terms of its contract with the Union by failing to make the required payments to the Pension Fund and the Welfare Fund, since about February 10, as provided by its contract with the Union.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1993.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York City (the facility), has been engaged in the operation of a restaurant. Annually, Respondent derives gross revenues in excess of $500,000 and, for the same period, purchases and receives at its facility products, goods, and materials valued in excess of $5000 from enterprises located within the State of New York, which enterprises received the products, goods, and materials directly from points outside the State of New York. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

The Union represents Respondent's employees in the following appropriate unit:

> All dining room, kitchen and bar employees including captains, waiters, waitresses, busboys, bartenders, cooks, pastry cooks, dishwashers, pot washers, and porters employed by Respondent at its facility, excluding all other employees, guards and supervisors as defined in the Act.

The most recent collective-bargaining agreement between the parties was effective for the period October 1, 1989, through September 30, 1992, and shall be referred to herein as the agreement. No subsequent agreement was entered into between the parties. The agreement requires Respondent to make specified payments to the Hotel Employees and Restaurant Employees International Union Welfare Fund (the Welfare Fund) and the Hotel Employees and Restaurant Employees International Union Pension Fund (the Pension Fund). These payments were due to be received by the funds on the 10th day of the month following the month for which the payments were required and the amount paid depended on the number of employees employed each week during the period. During 1992, Respondent fell behind in these payments. On November 2, 1992, the Union received checks from Respondent in full payment of its Pension Fund and Welfare Fund contributions for the months of July, August, and September 1992. The next payment that the Union received from Respondent was on January 27, when it received a check in full payment of Respondent's obligations to the Pension Fund and the Welfare Fund for the months of October, November, and December 1992. Respondent made no subsequent payments to the Pension Fund or the Welfare Fund.

Remigo Raicovich, Respondent's president, testified that in March or April he told Union Representative Jaime Flores that he could no longer afford the payments to the Pension Fund and Welfare Fund, and if he had to continue making these payments he could not remain in business. He testified that he could not remember Flores' reply, but in his affidavit given to the Board, he states that Flores told him that he would have to make the payments anyway. In about February or March, Flores offered him a 1-year freeze in wage rates and contributions to the funds if he signed a new contract with the Union. He refused to sign a new contract on the ground that he couldn't afford to pay what the Union was asking. Phyllis Lime, who is employed as the billing and general manager for the Welfare and Pension Funds, testified that due to the Respondent's delinquencies in its funds payments its employees lost their coverage under the funds effective March 31.

Respondent has two defenses herein: that since the contract expired on September 30, 1992, and no subsequent agreement was executed, no Pension or Welfare payments were due from Respondent during the periods in question. In addition, Respondent defends that since the unfair labor practice charge herein was filed on July 1, the allegations herein are barred by Section 10(b) of the Act.

Buck Brown Contracting Co., 272 NLRB 951 at 953 (1984), states:

> It is well settled that an employer violates Section 8(a)(5) and (1) when it unilaterally changes or discontinues existing terms and conditions of employment—including contributions to contractual fringe benefit funds—upon the expiration of a collective-bargaining agreement unless: (1) the union has waived bargaining on the issue; or (2) the parties have bargained to impasse and the unilateral change is reasonably encompassed by the employer's preimpasse proposals. It also is well settled that an employer acts in derogation of its bargaining obligation under Section 8(d) if it unilaterally changes or otherwise repudiates terms or conditions of employment contained in a collective-bargaining agreement during the life of that agreement.

The sole evidence in this regard is that the Union offered Raicovich a 1-year freeze in wages and fund payments if he executed an contract, an offer that Respondent refused. There is no evidence that the Union waived these fund payments or that the parties bargained to impasse on the subject. Respondent therefore continued to be obligated to make these fund payments after the contract expired on September 30, 1992.

Counsel for Respondent, in his brief, cites *Chemung Contracting Corp*., 291 NLRB 773 (1988), and *Park Inn Home for Adults*, 293 NLRB 1082 (1989), in support of his 10(b) defense. I find, however, these cases are clearly distinguishable from the instant matter. In *Chemung*, supra at 774, the Board found that the General Counsel was ''barred from bringing any complaint in which the operative events establishing the violation occurred more than 6 months before the unfair labor practice charge had been filed and served.'' More specifically, the Board stated:

> In the instant case it is clear that outside the 10(b) period the Respondent unequivocally repudiated its obligation to make contributions into the trust funds and the Union knew of this action. The Respondent at no time since has resumed making such payments. Furthermore, the Respondent has not engaged in any conduct, nor have there been any intervening circumstances that can be construed as inconsistent with the Respondent's initial actions. Thus, because the operative facts establishing the violation occurred outside the 10(b) period, we find that the applicable complaint allegations are time barred and that the Board is precluded from deciding the underlying substantive legal issues.

Similarly in *Park Inn Home*, the Board, relying on *Chemung*, dismissed this portion of the complaint because the union was on notice before the 10(b) date that the employer had repudiated its obligation to contribute to the funds. The obvious difference between these cases and the instant matter is that in the instant matter the Union did not have the notice of repudiation outside the 10(b) period. Respondent's final payments to the funds was made on January 27, 5 months and a few days prior to the filing of the charge herein. It was not until after that date that Respondent unequivocally repudiated its obligation to make these fund payments. The Union could not have anticipated this repudiation at an earlier time (outside the 10(b) period as counsel for Respondent would have us find) as Respondent had consistently been late in its payments to the funds. From December 1991 to November 1992, its fund payments were more than 2 months late on average. I therefore find that the complaint allegations herein are not barred by Section 10(b) of the Act and that by unilaterally failing and refusing to make these payments to the Welfare Fund and the Pension Fund since January, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the collective-bargaining representative of the following of Respondent's employees constituting a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All dining room, kitchen and bar employees including captains, waiters, waitresses, busboys, bartenders, cooks, pastry cooks, dishwashers, pot washers and porters employed by Respondent at its facility, excluding all other employees, guards and supervisors as defined in the Act.

4. By unilaterally failing and refusing to make the required Pension Fund and Welfare Fund payments to the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I recommend that Respondent be ordered to pay to the Union the specified

amounts due to the Pension Fund and the Welfare Fund, together with the required reports, for the months January 1993 to the present time, with interest. If any employee of Respondent in the above-mentioned unit, who was employed by Respondent during this period, suffered a loss due to Respondent's failure to make these payments, Respondent shall be ordered to reimburse these employees for the amount of the loss they suffered, with interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, R.R.R. Restaurant, Inc. d/b/a Capriccio Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by unilaterally ceasing to make contributions to the Union's Pension Fund and Welfare Fund as provided in its collective-bargaining agreement with the Union which expired on September 30, 1992.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its unit employees by making all Pension Fund and Welfare Fund contributions for the months of January 1993 to the present, as required by the collective-bargaining agreement, and which would have been paid absent Respondent's unilateral discontinuance of the contributions, and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such contributions.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(c) Post at its facility in New York, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Hotel Employees and Restaurant Employees Union, Local 100, of New York, New York and Vicinity, AFL–CIO (the Union) by unilaterally ceasing to make contributions to the Union's Pension Fund and Welfare Fund as provided in the collective-bargaining agreement between us effective October 1, 1989, through September 30, 1992.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL pay to the Pension Fund and the Welfare Fund the contributions that we should have made under the terms of our contract, from January 1993 to date, and WE WILL reimburse our employees for any expenses they incurred due to our failure to make such contributions.

R.R.R. RESTAURANT, INC. D/B/A CAPRICCIO RESTAURANT